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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH PEREZ,

Defendant and Appellant.

B284398

(Los Angeles County  
Super. Ct. No. LA083397)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard H. Kirschner, Judge. Affirmed in part, reversed in part and remanded with directions.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

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Joseph Perez appeals from a judgment entered after a jury convicted him of the first degree murder of Miles Rose, second degree robbery, and possession of a firearm by a felon. As to all counts, the jury found true the special allegation the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)).<sup>1</sup> The jury also found true multiple firearm-use enhancements. Perez contends on appeal there was insufficient evidence to support the jury's true finding on the gang enhancement. He also asserts remand is necessary to allow the trial court to exercise its discretion whether to strike the firearm-use enhancements imposed pursuant to section 12022.53, subdivision (d).

We affirm the conviction, but reverse the sentence on the gang enhancement imposed on count 1 because, as argued by the People, the trial court erred in imposing but staying the 10-year sentence on the enhancement. On remand the trial court should exercise its discretion whether to impose or strike the gang enhancements as to all counts, as well as the firearm-use enhancements as to counts 1 and 2.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. *The Information***

The information charged Perez with first degree murder (§ 187, subd. (a); count 1), second degree robbery (§ 211; count 2), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count

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<sup>1</sup> All further statutory references are to the Penal Code.

3).<sup>2</sup> The information alleged the special circumstance Perez committed the murder while engaged in the commission of a robbery (§ 190.2, subd. (a)(17)). The information further alleged as to all counts that Perez committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). The information alleged six special allegations as to counts 1 and 2: Perez personally used a firearm (§ 12022.53, subd. (b)); Perez personally and intentionally discharged a firearm (§ 12022.53, subd. (c)); in the commission of the offense Perez personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)); a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)); a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)); and a principal personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)). The information also alleged Perez served a prior prison term within the meaning of section 667.5, subdivision (b).

Perez pleaded not guilty and denied the special allegations.

B. *The Evidence at Trial*

1. *The search for Xanax pills*

On May 5, 2016 Perez was at a motel in Sylmar with Cindy Catalan and Perez's friend, Evelyn Martinez. Catalan had been using crystal methamphetamine and heroin, and Perez and

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<sup>2</sup> The information also charged codefendant Cindy Catalan in counts 1 and 2. The trial court granted Perez's motion to sever the trials, and her case proceeded to trial first. At her trial Catalan entered a negotiated plea of no contest in exchange for her agreement to testify at Perez's trial.

Martinez had been using crystal methamphetamine and Xanax. Catalan and Martinez knew Perez was a member of the San Fernando gang, with the moniker “Spooks.” That morning Catalan exchanged text messages with two members of the San Fernando gang, “Fats” and “Termite,” about her intent to sell a stolen 2010 Toyota Corolla she had in her possession.

Around noon Perez and Martinez decided to obtain Xanax pills. Catalan helped them arrange a purchase by texting a member of the San Fernando gang named “Swipes.” She asked him, “[H]ey, you got Xannies or a connect?”<sup>3</sup> Swipes responded he was trying to find a connect, and would let Catalan know as soon as he found one. Swipes then texted, “for sure, though?” Catalan responded, “You too for sure?” Swipes affirmed, “On the hood,” and Catalan responded, “on Nando.” According to Catalan, “on the hood” meant “for sure . . . that it’s going to be done.” “[O]n Nando” was short for “San Fernando.” Catalan further described the exchange as “an agreement that [they] were going to find what [they] were trying to find.” When Catalan asked Swipes how many pills he was trying to get, Swipes responded, “I got 30.”

Perez and Martinez also attempted to find a source for Xanax pills. Martinez was able to make arrangements with her source to buy approximately 50 to 60 pills. Perez, Catalan, and Martinez then left the motel in two cars. Perez and Martinez drove a truck that Perez had parked at the motel, while Catalan left in the stolen Corolla. Catalan followed Perez and Martinez to Perez’s home, where Perez left the truck. Then the three left in

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<sup>3</sup> “Xannies” refers to Xanax pills, and “connect” refers to someone from whom drugs could be purchased.

the Corolla. Catalan sat in the driver's seat; Martinez sat in the front passenger seat; and Perez sat in the back seat behind Martinez. Catalan was wearing a sweater with the letters "S.F." to represent the San Fernando gang.

Catalan, Perez, and Martinez drove to an apartment building on Hatteras Street in Tarzana to meet Martinez's friend Rose to buy the Xanax pills. On their way, Perez told Catalan they should "come up" on the seller. Catalan described this as taking the drugs from Rose without paying. Martinez heard Catalan and Perez discuss whether they were "down for the come-up."

## 2. *The robbery and shooting of Rose*

Catalan backed into a parking space at the apartment building. Martinez called Rose and asked him to come downstairs. Rose approached the passenger front window, where Martinez was sitting. Martinez introduced Rose to Perez and Catalan, and they began negotiating the purchase. Rose handed the Xanax pills to Martinez, who passed them to Catalan, who began counting them. Catalan then passed the pills to Perez, who was still sitting behind Martinez. Perez also counted the pills, then gave \$60 to Rose. Rose said that was "not enough," and tried to give the money back to Perez. Perez would not take the money, and held on to the pills. Perez asked Rose whether he had any marijuana, and Rose answered in the affirmative. Perez told Rose to get the marijuana, then he would pay Rose for both the Xanax and marijuana. Rose refused, pointing out that Perez had not even paid him the full amount for the Xanax pills.

Perez appeared to stall, and did not return the pills to Rose. Martinez insisted Perez return the pills, but Perez refused. Perez

began kicking Catalan's seat and, when she turned to look at him, nodded at her. Catalan understood the nod to mean Perez wanted her to drive away. She hesitated, then turned to look at Perez again and saw he had a gun. Martinez also saw the gun in Perez's lap. Perez pointed the gun at Rose and said the pills were now his. Rose angrily responded, "You're not going to rob me."

Perez told Catalan to leave as Rose jumped through the front passenger side window over Martinez. Catalan began to drive away, but Rose reached over and shifted the car into "park," and the car stopped. Catalan put the car back in drive and again started to drive away. Rose made his way to the backseat and began fighting with Perez. Rose said, "[I]f you have a gun, you'd better use it." As Catalan drove away, she heard a gunshot; Martinez heard two. Catalan panicked and jumped out of the moving car, which crashed into a wall. Catalan sustained several injuries, but was able to run home. She threw away the "S.F." sweater she was wearing.

Martinez was still in the car when it crashed, but was able to exit the car and run away. Perez exited and ran in the same direction as Martinez. Perez told her not to say anything about the incident. Rose exited the vehicle, and left in a different direction.<sup>4</sup>

Two residents of the apartment building on Hatteras Street witnessed the immediate aftermath of the shooting. Cesar Barrera was outside when Rose ran up to him asking for help.

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<sup>4</sup> Surveillance video recovered from the parking area depicted Rose leaning over the window talking with the occupants of the Corolla; Rose jumping into the car; the car moving, then stopping; the car moving again, then crashing; and the occupants fleeing in different directions.

Barrera saw another person run away. He ran into his apartment and asked his girlfriend to come outside and call 911. Barrera's girlfriend called 911 and reported Rose had been shot and there was a trail of blood in the alley. Barrera saw that Rose had a hole in his chest and asked him if he accidentally shot himself. Rose said no. Barrera then asked Rose if the person who ran away was the one who shot him, and Rose replied, "No. The dude." Barrera administered aid to Rose until the police arrived.

### 3. *The investigation*

Los Angeles Police Detective James Fillmore and his partner responded to the shooting. By the time they arrived at the scene, Rose was dead. Detective Fillmore observed the stolen Corolla crashed into a wall and a trail of blood from the car to Rose's body, which was lying face up on the ground. He noted blood on the passenger door and inside the car, as well as a bullet hole through the car's roof. He found an expended nine-millimeter caliber casing on the driver's seat, which he concluded was fired from a semiautomatic firearm. Detective Fillmore recovered from the car two cell phones, a woman's purse, narcotics paraphernalia, and a key lanyard with a San Francisco 49ers logo, which he described as "common" for the San Fernando gang. Inside the purse was a wallet containing Perez's identification.

Martinez called the police a few hours after the shooting to report the incident. She was angry and scared, and stated her friend Rose "didn't deserve to die over some pills." Detective Fillmore and his partner interviewed Martinez three to four hours after the shooting. Detective Fillmore described Martinez

as truthful, and noted they were able to corroborate the information she provided. Martinez told the detectives Perez was “a coward,” “not a gangster,” and he was “in this for himself.”

On May 8, 2016 Los Angeles Police Officer Benny Simonzad and his partner responded to a shoplifting call on San Fernando Road, where they attempted to detain Perez and Catalan. By this time Catalan had started to hang out again with Perez.<sup>5</sup> Perez fled but was detained about a block away. Catalan fled the scene but was later arrested.

Detective Fillmore searched Perez’s residence and seized a backpack with the initials S.F., a San Francisco Giants cap commonly worn by San Fernando gang members, a semiautomatic gun holster, two magazine holsters, live nine-millimeter caliber ammunition, and a cardboard box with San Fernando gang graffiti and the moniker “Spooks.” The nine-millimeter caliber ammunition was consistent with the expended cartridge found inside the Corolla.

Detective Fillmore interviewed Perez, who denied any involvement in the events of May 5, 2016. Perez told Detective Fillmore he would have remembered if something like the robbery and shooting death of Rose had happened.

#### 4. *The gang expert testimony*

Los Angeles Police Officer Christian Mejia testified as a gang expert. He testified the San Fernando gang was established in the 1920’s and presently had over 600 members. The gang’s

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<sup>5</sup> When they met up again after the shooting, Catalan asked Perez what happened to Rose in the car. Perez responded by showing her a news article about the shooting on his phone, and told her he had disposed of the gun.



territory covered San Fernando, Sylmar, parts of the Santa Clarita Valley, and the Antelope Valley. However, gang members commit crimes outside the gang's territory in an effort to expand its reach. Officer Mejia explained the gang is "one of the most violent" and "powerful" gangs in the area, and is "always looking at expanding its reaches." The gang's primary activities include murder, attempted murder, assault with a deadly weapon, shootings, narcotics sales, gun sales, gun possession, vandalism, carjacking, and robbery. Officer Mejia testified that committing violent crimes helps the gang's reputation by causing fear and intimidation within the community and discouraging community members from cooperating with law enforcement. San Fernando gang members wear San Francisco Giants and San Francisco 49ers attire to signify gang membership.

Officer Mejia testified Perez was a member of the San Fernando gang, with the moniker "Spooks." He had not met Perez, but heard him on recorded jail calls identify himself as "Spooks." In addition, Officer Mejia identified items seized from Perez's residence as consistent with membership in San Fernando, including the backpack with the letters "S.F." and a box with the words "Spooks S.F.," "San Fer S.F.," "San Fer," and "S.F. XIII," with the Roman numeral indicating allegiance to the Mexican Mafia.

Officer Mejia testified Catalan was an associate, but not a member, of the San Fernando gang. He based his opinion on his interactions with her, photographs of her wearing San Francisco Giants attire, and photographs of her with members of the San Fernando gang. An associate is someone who has intimate knowledge about the gang, spends time with gang members, and assists in committing crimes with gang members. Officer Mejia

previously arrested Catalan when she was coming from a known gang location, accompanied by a known San Fernando gang member. Additionally, law enforcement had a field identification card for Catalan from an arrest with a gang member.

Officer Mejia opined Perez and Catalan would not claim to be a member or associate of San Fernando unless they held those roles because they would be assaulted or killed for a false claim. When somebody says, “on the hood,” it is a “[v]ery serious” pledge and means the person is “swearing on the neighborhood that whatever they are saying is correct.”

In response to a hypothetical mirroring the facts of the case, Officer Mejia testified the robbery and murder of the drug dealer was done “for the benefit of, in association [with], and to further . . . the San Fernando criminal street gang.” He explained the gang is akin to an organization that needs money to operate its business, which is primarily narcotics sales. Proceeds from drug sales in the gang’s territory go to higher members of the gang or Mexican Mafia members in prison. These proceeds are used to resupply the gang with narcotics and firearms. The fact the gang member and associate committed the crimes outside of the gang’s territory while wearing gang attire demonstrated their intent to instill fear and intimidation outside their own community. Additionally, the violent actions show the community the gang has “power” and “courage” and is not afraid to travel outside the gang’s territory to conduct business and make money.

In addition, that the gang member and associate were actively trying to locate other “connects” with San Fernando gang members demonstrated the robbery and murder were committed for the benefit of, at the direction of, or in association with a

criminal street gang, with the “specific intent to promote San Fernando.” Under the facts of the hypothetical, Officer Mejia opined the gang member and associate were working “in association” with one another, and the gang member kicking the associate’s back seat to drive off shows the associate was acting “at the direction of” the gang member. The robbery and murder would be considered “putting in work” for the gang. By contrast, when a gang member commits crimes that are acts of personal misconduct, such as domestic violence or driving under the influence, those crimes would not be for the benefit of the gang.

According to Officer Mejia, the shooting occurred in territory claimed by the Reseda Southside gang, which is a newer, smaller, and less powerful gang than San Fernando. He testified there were no active rivalries between the Reseda Southside gang and the San Fernando gang at the time of the shooting.

### C. *The Verdicts and Sentence*

The jury found Perez guilty on all three counts. The jury also found the gang allegations true as to all counts and all the firearm allegations true as to counts 1 and 2. The jury found true as to count 1 the special circumstance allegation Perez committed the murder while he was engaged in the crime of robbery.

The trial court sentenced Perez on count 1 to life in prison without the possibility of parole, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). The trial court imposed but stayed a term of 10 years<sup>6</sup> for the

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<sup>6</sup> Although the abstract of judgment states the sentence was 25 years to life, the transcript and minute order from the sentencing hearing indicate the trial court imposed the correct

gang enhancement (§ 186.22, subd. (b)(1)(C)). On count 2, the trial court sentenced Perez to the middle term of three years, but stayed the sentence pursuant to section 654.<sup>7</sup> On count 3, the trial court sentenced Perez to the middle term of two years, and ordered it to run concurrent with the sentence on count 1. The trial court sentenced Perez to an aggregate term of life without the possibility of parole, plus 25 years to life.

Perez timely appealed.

## DISCUSSION

### A. *Standard of Review*

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable

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10-year sentence under section 186.22, subdivision (b)(1)(C). The trial court did not state whether it was imposing but staying the gang enhancement as to all counts. The abstract of judgment only reflects imposition of the gang enhancement as to count 1. On remand the trial court should address the sentence on the gang enhancement as to all counts.

<sup>7</sup> On remand the trial court should clarify whether it is imposing and staying the firearm-use enhancements as to count 2 or, as discussed below, striking the enhancements pursuant to section 12022.53, subdivision (h). The court should likewise clarify whether it is staying or striking the additional firearm-use enhancements alleged as to count 1 other than the enhancement imposed under section 12022.53, subdivision (d).

doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*), accord, *People v. Perez* (2017) 18 Cal.App.5th 598, 607 (*Perez*) ["We review the entire record in search of reasonable and credible evidence of solid value, viewing all the evidence in the light most favorable to the prosecution, and drawing all reasonable inferences in favor of the jury's findings."].)

B. *Substantial Evidence Supports the True Finding on the Gang Enhancement*

To prove the gang enhancement, the prosecution must prove both prongs of the enhancement under section 186.22, subdivision (b)(1). (*Perez, supra*, 18 Cal.App.5th at p. 606; *People v. Rios* (2013) 222 Cal.App.4th 542, 561 (*Rios*).) "First, the prosecution is required to prove that the underlying felonies were "committed for the benefit of, at the direction of, or in association with any criminal street gang." [Citation.] Second, there must be evidence that the crimes were committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members."" (*Perez*, at p. 607, quoting *Rios*, at p. 561.)

1. *There was substantial evidence Perez committed the underlying felonies for the benefit of and in association with the San Fernando gang*

Perez contends Officer Mejia’s expert testimony that Perez committed the underlying felonies at the direction of, for the benefit of, and in association with the San Fernando gang was not supported by the evidence, and therefore his testimony did not support the first prong. We conclude substantial evidence supports the true finding on the gang enhancement based on a finding Perez committed the underlying crimes for the benefit of and in association with the San Fernando gang.<sup>8</sup>

“Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; accord, *Perez, supra*, 18 Cal.App.5th at p. 608.) Further, “[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22(b)(1).” (*Albillar, supra*, 51 Cal.4th at p. 63; accord, *Perez*, at p. 608.) However, expert gang testimony cannot be “purely

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<sup>8</sup> Because we find there was substantial evidence Perez committed the underlying felonies for the benefit of and in association with the San Fernando gang, we do not address whether he committed the underlying felonies at the direction of San Fernando gang. (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484 [application of the enhancement requires only one of the three alternatives for establishing the first prong].)

conclusory and factually unsupported.” (*People v. Ramirez* (2016) 244 Cal.App.4th 800, 819-820; accord, *People v. Richardson* (2008) 43 Cal.4th 959, 1008 [an “expert’s opinion may not be based ‘on assumptions of fact without evidentiary support’”].)

Crimes can be committed “in association with a gang if the ‘defendants relied on their common gang membership and the apparatus of the gang in committing’” them. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1367 [gang members committed armed robberies in association with the gang because crimes were committed in concert with fellow gang members]; accord, *Albillar, supra*, 51 Cal.4th at p. 60 [three gang members who raped victim committed crimes in association with gang because they “relied on their common gang membership and the apparatus of the gang in committing the sex offenses”]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*) [three gang members committed robberies together in association with the gang].)

Perez contends he could not have committed the underlying felonies in association with the San Fernando gang because Catalan was an associate, rather than member of the gang. However, that Catalan was not a full-fledged gang member is not dispositive. (See *People v. Prunty* (2015) 62 Cal.4th 59, 84 [“[E]vidence of gang membership is ‘neither necessary nor sufficient to establish any element of the gang enhancement.’”]; *People v. Miranda* (2011) 192 Cal.App.4th 398, 404-406, 412-413 (*Miranda*) [substantial evidence supported the true findings on the gang allegations where the three “members or associates” of the same gang committed a shooting in concert in gang territory after gang’s name was called out]; *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1355, 1361-1362 (*Daniel C.*) [substantial

evidence supported finding robbery was committed in association with a criminal street gang where defendant and one of his confederates were “affiliates” of the gang and the third actor was a “member” of the gang].)<sup>9</sup> Further, according to Officer Mejia, gang associates have intimate knowledge of the gang and assist the gang in committing crimes.

Substantial evidence supported Officer Mejia’s opinion, in response to a hypothetical based on the facts of this case, that Perez and Catalan, as a San Fernando gang member and associate, respectively, were working in association with one another and the gang in committing the robbery and murder. Perez had gang-related attire, including a backpack with gang insignia, and other items found in his home with the gang name and his gang moniker, “Spooks.” He was recorded discussing the gang’s affairs and referring to himself as “Spooks.” Catalan and Martinez both testified Perez was a member of the San Fernando gang, with the moniker “Spooks.” Officer Mejia testified that if a nongang member were to self-identify as a San Fernando gang member, as Perez had, he would risk being assaulted or killed.

Catalan’s association with the San Fernando gang was significant. She admitted to wearing the sweater with the letters “S.F.” to represent the San Fernando gang. Officer Mejia testified Catalan was sufficiently close to the San Fernando gang that she had a field identification card from her arrest with a San Fernando gang member. He had also previously arrested Catalan while she was in the company of another known San

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<sup>9</sup> The gang expert in *Daniel C.* testified that someone who does not meet all the criteria for being an active gang member, but “associates with other . . . gang members,” is an “affiliate.” (*Daniel C.*, *supra*, 195 Cal.App.4th at p. 1362, fn. 10.)



Fernando gang member. On the morning of the shooting Catalan exchanged texts with San Fernando gang members about selling a stolen vehicle in her possession. When Perez wanted to obtain Xanax, Catalan contacted a San Fernando gang member to buy the pills.

There was likewise substantial evidence of Perez and Catalan working in concert with each other and the gang. When Catalan contacted the San Fernando gang member to obtain Xanax, the gang member agreed to obtain the drugs “[o]n the hood,” and Catalan confirmed, “on Nando.” Catalan committed to obtain the drugs “for sure.” On their way to meet Rose, Perez told Catalan he planned on taking the pills without paying. Catalan aided and abetted this plan by continuing to drive to the transaction, then backing into a parking space to allow for a faster escape. When Perez refused to pay more for the pills, he kicked Catalan’s seat to tell her to drive away. Catalan saw Perez’s gun and, as Rose jumped through the window, began to drive away. Following the shooting, Catalan discarded her gang-related sweater, an act the jury could reasonably infer was an attempt to conceal that the crimes were committed in association with the gang. Catalan continued to associate with Perez after the shooting, and was detained with him three days later as part of a shoplifting investigation.

Officer Mejia also identified two ways in which the San Fernando gang would benefit from commission of the crimes. First, the stolen Xanax pills could be sold for a profit and the proceeds used to fund gang activities and be distributed to higher members of the gang and the Mexican Mafia. Swipes, the San Fernando gang member from whom Catalan sought help to find the Xanax, told her, “I got 30” pills. Yet Perez and Catalan

instead chose a source with no apparent San Fernando gang connection who had 50 to 60 pills. Perez and Catalan then discussed on the way that they would “come up” on the drug dealer, meaning to take the pills without paying. That they chose the source with 50 to 60 pills, instead of the 30 offered by the San Fernando member, supports a reasonable conclusion Perez intended to sell all or some of the pills, and provide the proceeds to the gang. Additionally, the jury could have reasonably believed by choosing a source with no apparent gang ties, Perez had an easier target for a robbery.

Second, Officer Mejia opined the violence of the crimes benefitted the reputation of the gang, instilling fear in the community and other gangs. Although there was no evidence of gang signs or calling of a gang name during the robbery and shooting, Catalan was wearing a sweater representing the San Fernando gang. Perez was aware Rose’s death was reported in the news. The crime was committed in an area adjacent to the territory controlled by San Fernando, in which a smaller, newer, and less powerful gang operated. Officer Mejia testified the San Fernando gang is “always looking at expanding” its territory. The jury could reasonably have believed Perez intended to use violence in a neighborhood controlled by a less powerful gang to expand San Fernando’s reach further into adjacent territories.

Perez points to the facts of *Perez, supra*, 18 Cal.App.5th 598 to support his contention there was insufficient evidence he committed the robbery and killing to benefit San Fernando. *Perez* is distinguishable. There, the “only shred of evidence” connecting the shooting to the gang was that the defendant was a tattooed validated gang member. (*Id.* at p. 609.) The defendant was at a party of college students at which he unexpectedly

encountered a conflict between several students and his female friend, leading him to shoot several of the students. (*Id.* at pp. 602-605.) There was no evidence anyone at the party other than the defendant had gang ties, that anyone shouted a gang name or displayed a gang sign, or wore gang colors. (*Id.* at p. 609.) The defendant's visible tattoos were not gang-related. (*Ibid.*) The court rejected the "sweeping generalization" of the gang expert that "any shooting by a gang member is gang related because the use of violence enhances the gang member's reputation, and . . . instill[s] fear in the community," as "untethered" from the specific evidence in the case. (*Id.* at p. 610.)

By contrast, Perez and Catalan, a gang member and associate, respectively, drove together to the planned drug buy with a plan to rob the drug dealer of his drugs. Perez came prepared with a loaded gun. The plan started with Catalan contacting another San Fernando gang member about buying drugs and swearing on the gang she would obtain them "for sure." She wore a sweater that represented San Fernando. Nothing about the planned drug transaction and robbery was spontaneous or indicative of a personal dispute. This was not just "any shooting by a gang member" (*Perez, supra*, 18 Cal.App.5th at p. 610), but rather fell squarely within the core functions and activities of the San Fernando gang.

2. *There was substantial evidence Perez specifically intended to further, promote, or assist in the criminal activity of San Fernando gang members*

As to the second prong that the defendant committed the underlying offenses with the specific intent to further, promote,

or assist in the criminal activity of that gang, “[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.” ( *People v. Franklin* (2016) 248 Cal.App.4th 938, 949; accord, *Rios, supra*, 222 Cal.App.4th at pp. 567-568.) “For this reason, ‘we routinely draw inferences about intent from the predictable results of action.’” ( *Miranda, supra*, 192 Cal.App.4th at p. 412.) “While a gang expert is prohibited from opining on a defendant’s specific intent when committing a crime, the prosecution can ask hypothetical questions based on the evidence presented to the jury . . . whether the hypothetical perpetrator harbored the requisite specific intent.” ( *Perez, supra*, 18 Cal.App.5th at p. 607.)

As the Supreme Court concluded in *Albillar*, “if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” ( *Albillar, supra*, 51 Cal.4th at p. 68; accord, *People v. Franklin, supra*, 248 Cal.App.4th at p. 949 [noting “scienter requirement may be satisfied with proof ‘that the defendant intended to and did commit the charged felony with known members of a gang,’” but concluding intent requirement not met where defendant committed crimes with members of a different gang]; *Miranda, supra*, 192 Cal.App.4th at p. 412 [substantial evidence supported finding of specific intent to benefit gang where defendant gang member committed crimes with two other members or associates of the gang in gang territory].)

The specific intent prong may also be met where the defendant acts alone. ( *Rios, supra*, 222 Cal.App.4th at p. 564

[“section 186.22(b)(1) gang enhancement may be applied to a lone actor”]; *Morales, supra*, 112 Cal.App.4th at p. 1198 [“the typical close case is one in which one gang member, acting alone, commits a crime”]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931 [gang member acting alone intended to benefit gang by selling drugs where he had permission from gang to sell drugs in gang territory].)

However, when a gang member acts alone, expert testimony that the gang member intended to benefit the gang, in the absence of underlying facts to support the opinion, is insufficient to prove the specific intent prong of the gang enhancement. (*Rios, supra*, 222 Cal.App.4th at p. 575 [evidence not sufficient to prove specific intent prong based solely on fact defendant was a gang member who possessed a gun in a stolen vehicle]; *Perez, supra*, 18 Cal.App.5th at p. 614 [evidence that gang member with tattoos shot students at party insufficient to show specific intent]; *People v. Ochoa* (2009) 179 Cal.App.4th 650, 663, 665 [no substantial evidence of second prong of gang enhancement where gang member committed carjacking alone and there was no evidence connecting crime to gang other than expert testimony].)

Here, as in *Miranda*, Perez committed the robbery and murder with a known associate of the gang, supporting the jury’s finding he intended to promote, further, or assist criminal conduct by gang members. (*Miranda, supra*, 192 Cal.App.4th at p. 412; see *Albillar, supra*, 51 Cal.4th at p. 68.) Even if we treat Perez as a lone actor in light of Catalan’s position as an associate, not a gang “member,” in contrast to the lone actors in *Rios*, *Perez*, and *Ochoa*, as discussed above, there is substantial evidence connecting the crimes to the San Fernando gang.

Perez's reliance on *Daniel C.* to support his argument he lacked the requisite specific intent is misplaced. In *Daniel C.*, the minor, a gang affiliate, entered a supermarket with two friends, one of whom was a gang member, but the friends left before the minor attempted to steal a bottle of liquor. (*Daniel C.*, *supra*, 195 Cal.App.4th at p. 1353.) The store manager attempted to stop the minor from leaving with the bottle, but in the ensuing scuffle the bottle broke. (*Ibid.*) The minor struck the manager with the broken bottle, ran out of the store, and fled in a truck with his friends and a fourth person. (*Id.* at pp. 1353-1354.) The Court of Appeal concluded there was not substantial evidence to support the intent prong, noting the minor and his friends did not identify themselves as gang members nor did the victim or any witnesses know they were gang members or affiliates. (*Id.* at pp. 1363-1364.) Further, there was no evidence the minor and his friends entered the store planning to commit a violent crime; instead, the breaking of the bottle was “happenstance” and the minor’s assault was “simply a spur-of-the-moment reaction” to the manager’s attempt to stop the theft. (*Ibid.*)

Unlike the friends in *Daniel C.*, Perez and Catalan worked in concert to take Rose’s pills without paying for them, after Catalan discussed with another gang member the purchase of pills and swore “on Nando” they would obtain the drugs. In addition, she wore a gang-related sweater during the encounter. In light of Officer Mejia’s testimony that narcotics sales are among the San Fernando gang’s core activities, that proceeds from the sales are distributed among higher ups of the gang or the Mexican Mafia, and that the gang uses violence to expand its reach, the jury reasonably could have concluded Perez did not act at the “spur-of-the-moment” (*Daniel C.*, *supra*, 195 Cal.App.4th at

p. 1363), but planned to commit the crimes with the intent to further, promote, or assist other members of the San Fernando gang in their criminal activities.

C. *Remand for Resentencing Is Necessary Pursuant to Section 12022.53, Subdivision (h)*

Perez contends, the People concede, and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the firearm-use enhancements imposed on count 1 pursuant to section 12022.53, subdivision (d).

In 2017 the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1, 2018. Senate Bill No. 620 amended section 12022.53, subdivision (h), to give trial courts discretion to strike firearm-use enhancements under this section in the interest of justice. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Section 12022.53, subdivision (h), provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

The People concede section 12022.53, subdivision (h), as amended, applies retroactively to Perez, whose sentence was not final at the time the provision came into effect. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.)

Further, remand is necessary to allow the trial court to exercise the discretion it did not have at the time of sentencing

because the trial court did not indicate at sentencing whether it would have stricken the firearm-use enhancements if it had the discretion. “[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425; accord, *People v. Billingsley*, *supra*, 22 Cal.App.5th at p. 1081 [remand is required when “the record does not ‘clearly indicate’ the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion”].)

D. *The Trial Court Erred in Staying the Gang Enhancement*

The People contend the trial court erred in imposing but staying on count 1 the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). Perez does not contend otherwise in his reply brief. The gang enhancement is mandatory and “shall” be imposed when found true. (*People v. Le* (2015) 61 Cal.4th 416, 423; *People v. Robinson* (2012) 208 Cal.App.4th 232, 257-261.) However, section 186.22, subdivision (g), permits the trial court to strike this enhancement “in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.” Thus, the trial court must either impose the 10-year enhancement or strike the enhancement and specify its reasoning for doing so on the record.

Because the trial court did not have the authority to stay the 10-year enhancement under section 186.22, subdivision (b)(1)(C), we reverse the sentence, and remand for the trial court



to exercise its discretion whether to impose or strike the enhancement.

### **DISPOSITION**

The judgment of conviction is affirmed. We reverse the sentence, and remand with directions for the trial court to exercise its discretion whether to impose or strike the gang and firearm enhancements imposed pursuant to sections 186.22, subdivision (b)(1)(C), and 12022.53.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.